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No. 96-437

In the
Supreme Court of the United States
October Term, 1996

IN Re: BRUCE YOUNG AND NANCY YOUNG,
Debtors.

JULIA A. CHRISTIANS, TRUSTEE,
Petitioner,

vs.

CRYSTAL EVANGELICAL FREE CHURCH,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF THE MINNESOTA CIVIL LIBERTIES UNION
In Support of the Position of Petitioner.

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THE MINNESOTA CIVIL LIBERTIES UNION'S MOTION TO FILE AN *AMICUS CURIAE* BRIEF

The Minnesota Civil Liberties Union ("MCLU") hereby respectfully moves this honorable Court for an Order permitting the MCLU to file an *amicus curiae* brief in the above-captioned matter. The respondent, Crystal Evangelical Free Church, refuses to consent to the MCLU's participation.

The MCLU's interest in this case is sincere. Its sole purpose is to preserve and protect civil liberties. To that end, the MCLU identified two infirmities in the Eighth Circuit's holding below. First, the Eighth Circuit applied the Religious Freedom Restoration Act, 42 U.S.C. 2000bb1-4 ("RFRA") in a manner that grants an exclusively religious exemption from the avoidable transfers provisions of the Bankruptcy Code and in so doing, it has changed the rules and relevant inquiries in all commercial transactions, subjugating those rules and inquiries to individual religious preferences.

Second, by enacting RFRA, Congress has impermissibly usurped the role of the judiciary. While the MCLU is not a proponent of this Court's holding in Employment Div. v. Smith, 494 U.S. 872 (1990), the MCLU passionately believes that allowing Congress, which is accountable to the majority's will, to in effect overrule this Court is more detrimental to civil liberties than is a judicial decision with which the MCLU disagrees.

For these reasons, the MCLU respectfully asks this Court to issue an Order allowing the MCLU to file the attached *amicus curiae* brief in this case.

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STATEMENT OF INTEREST OF THE MINNESOTA CIVIL LIBERTIES UNION

The Minnesota Civil Liberties Union ("MCLU") seeks to appear in this case as *amicus curiae*.[1] It is a non-profit, non-partisan organization whose purpose is to protect the rights and liberties established by the United States Constitution.

The MCLU's interest in this case is twofold: first, the United States Court of Appeals for the Eighth Circuit erred by violating the Establishment Clause of the First Amendment in its application of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb1-4 (1993) ("RFRA"); and second, Congress violated the doctrine of separation of powers by enacting RFRA in the first instance.

The results of these errors are profound. The Eighth Circuit attempted to foster free exercise rights in its application of RFRA. However in so doing it has singled out religious conduct and granted it a preference which is unavailable in a secular context. Far from encouraging the free exercise of religion, the Eighth Circuit's holding here will discourage creditors from transacting business with religious adherents whose faith encourages or requires tithing. The decision below breeds the very religious divisiveness that the Establishment Clause was intended to thwart.

In addition, Congress exceeded its constitutional authority in enacting RFRA. Congress' purpose in enacting RFRA was, unmistakably, to reverse this Court's Free Exercise Clause jurisprudence. No matter how well intended, Congress' effort is misguided. This Court, not Congress, is empowered to determine the scope of the constitutional protection to practice one's religion. Any attempt by Congress to usurp this Court's

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[1] The position presented in this brief is solely that of the Minnesota Civil Liberties Union. It does not represent the position of the American Civil Liberties Union.

role takes this nation a step closer to subjecting minority religious practices or beliefs and dissident or fringe voices to the potentially intolerant majority, a majority to which Congress must answer. The scope of religious liberty under the Constitution is exclusively the province of this Court which, unlike Congress, has no master but the enduring values embodied in the Constitution.

REASONS FOR GRANTING THE WRIT

This case exposes RFRA's constitutional infirmities in two ways. As applied here, RFRA creates a constitutionally repugnant establishment of religion with a concomitant chilling effect on free exercise rights. Moreover, RFRA grows out of Congress' unconstitutional usurpation of judicial authority which endangers the integrity of the very structure of our constitutional system of governance.

This Court already recognized the importance of analyzing RFRA's constitutionality by granting a Writ of Certiorari in City of Boerne v. Flores, ____ U.S. ___, 65 USLW 3017 (1996). This case differs from Flores only in that this case concerns RFRA's application to a federal rather than a state law. But for Flores' concern with the doctrine of federalism, the reasons under Supreme Court Rule 10 for which this Court should consent to review this case are identical to those in Flores and will not be rehashed here. Suffice it to say that the important question of RFRA's constitutionality has spawned hundreds of state and federal decisions since Congress passed RFRA in 1993. The MCLU respectfully urges this Court to review this case in addition to Flores so that it can address the constitutionality of RFRA as it applies in the federal statutory arena.

I. THE EIGHTH CIRCUIT'S APPLICATION OF RFRA VIOLATES THE ESTABLISHMENT CLAUSE.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion. . ." U.S. Const. Amend. I. In Lemon v. Kurtzman, 403 U.S. 602 (1971), this Court articulated a three-part test to determine whether government action constitutes an "establishment of religion" in violation of the First Amendment. Id. at 612-13. The Lemon test provides that state actions must (1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive entanglement between government and religion. See Lee v. Weisman, 505 U.S. 577, 585 (1992); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 395 n. 7 (1993) (applying Lemon test and noting that it remains good law). Applying the Lemon test to the decision below renders RFRA a constitutionally prohibited establishment of religion.

The Eighth Circuit applied RFRA to grant an exemption from the Bankruptcy Code to the practice of tithing, or donating money to a religious institution. The court below held that such tithes are exempt from the avoidable transfers provisions of the Bankruptcy Code, 11 U.S.C. § 548 (1978). The only beneficiaries of this exemption are religious organizations and they enjoy this exclusive benefit at the expense of the legal framework on which merchants rely when transacting business.

Congress was clear in promulgating its purpose in enacting RFRA:

> Purpose
>
> The purposes of this chapter are -

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb(b). The only purposes of RFRA are to create a cause of action available exclusively to religious adherents and to define the scope of the adherents' rights to practice their faith. As applied, RFRA blatantly contravenes the first prong of the Lemon test.

The effect of applying RFRA to the Bankruptcy Code here is to carve out an exemption in the Code for religious institutions that receive charitable but avoidable transfers. The exemption does not apply to any other charitable organization. By creating this lack of neutrality in its application, the Eighth Circuit has imbued RFRA with the primary effect of advancing religion.

This Court has repeatedly held that neutrality is the linchpin in evaluating government action under the effects prong of Lemon. "Neither the state nor the federal government. . . can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Bd. of Education, 330 U.S. 1, 15-16 (1974). Accord, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 591 (1989). This Court

> has rejected unequivocally the contention that the establishment clause forbids only

> governmental preference of one religion over another. . . . In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Abington School District v. Schempp, 374 U.S. 203, 216-226 (1963). This Court reaffirmed the neutrality principle just last year, in Rosenberger v. Rector and Visitors of the University of Virginia, ___ U.S. ___, 115 S.Ct. 2510, 2521 (1995).

This is not to say that government must be indifferent or insensitive to religion nor is Congress forbidden from enacting laws through which religious institutions advance their ends. It is simply that government cannot serve as the vehicle for that advancement.

> A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden "effects" under Lemon, it must be fair to say that government itself has advanced religion through its own activities and influence.

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 337 (1987). Here, government itself has advanced religion. When Congress enacted RFRA it effectively created an exclusively religious exemption to the Bankruptcy Code. In so doing, it altered commercial practices and made commercial transactions contingent on one party's religious beliefs and practices. RFRA, as applied here, subordinates secured debt and senior creditors to a religious organization that encourages the tithe. It thus infuses business transactions with the specter that religion may justify a breach of contract and excuse liability for that breach. This advances religion to the

point that one's faith now may control the commercial rights of others.

RFRA as applied here may also ultimately inhibit the free exercise of religion. Religion is now a relevant aspect of commercial transactions. Prudent lenders should reasonably inquire into their customers' religious practices. This fact certainly could result in a chilling effect on tithing, and therefore on one's right to freely practice his or her faith. See Christians v. Crystal Evangelical Free Church, 82 F.3d 1407, 1423 (8th Cir. 1994) (Bogue, J., dissenting).

RFRA has elevated religion above the rules of commercial transactions and it threatens to chill free exercise by effectively inhibiting transactions with those whose religion encourages tithing. As applied here, RFRA has the primary effect of advancing religion to the point that it will inhibit free exercise. RFRA fails the second prong of the Lemon test.

The Eighth Circuit's application of RFRA also excessively entangles government and religion and, therefore, is unconstitutional under the third prong of Lemon. Government's excessive entanglement with religion under RFRA manifests itself in two ways here. First, RFRA compels courts to evaluate the substantiality or the sincerity of a claimant's belief. 42 U.S.C. § 2000bb.1(a). This element of RFRA directly contradicts Supreme Court precedent.

> Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Employment Div. v. Smith, 494 U.S. 872, 887 (1990) (citations omitted). In this case the Eighth Circuit constructed a test for weighing the sincerity of religious belief, and discussed whether the religious adherents here were compelled

to tithe or merely encouraged to do so. Christians v. Crystal Evangelical Free Church (In re Young), 82 F.3d 1407 at 1418. This inquiry is impermissible because it enmeshes courts in the process of assessing religions and determining which practices and beliefs are central to those faiths at issue. See Widmar v. Vincent, 454 U.S. 263, 269-70, n. 6 (1981); Hamilton v. Schriro, 74 F.3d 1545, 1567 (8th Cir.) (McMillian, J., dissenting in part) cert. denied, ___ U.S. ___, 65 USLW 3262 (1996); Smith v. Fair Employment and Housing Comm'n., 913 P.2d 909, 913-39 (Cal. 1996) (Mosk, J., concurring). Courts cannot make such inquiries. RFRA's demand that courts do so and the Eighth Circuit's implementation of that RFRA standard violate the third prong of the Lemon test.

Moreover, the Eighth Circuit has expressly granted the exemption to those religions that encourage tithing. It is unclear whether this exemption extends to donations to religious entities that allow, but do not promote tithing. It is also unclear if this exemption applies to religiously-motivated contributions to secular charitable organizations. It is unclear whether every religiously-based justification for a donation will give rise to a RFRA exemption from the Bankruptcy Code, or if only those religions that traditionally require or encourage the tithe will enjoy the exemption.

In short, the flood gates are now open. Through RFRA, Congress has compelled courts to evaluate the centrality of particular religious practices, to compare and distinguish the teachings and commands of various religions to determine the import to a faith of a charitable act when laid next to the tenets of a different faith. RFRA engenders the divisiveness between the differing beliefs and practices of the different religions and appoints government, through the courts, as the ultimate arbiter to determine which religiously motivated practices are central enough to exempt adherents from the avoidable transfer provisions of the Bankruptcy Code. See Larkin v.

Grendel's Den, Inc., 459 U.S. 116, 127 (1982). This violates Lemon's third prong.

II. RFRA VIOLATES THE DOCTRINE OF SEPARATION OF POWERS

Nearly two hundred years ago, this Court declared that it alone bears the responsibility of determining "what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). This is particularly so where, as here, the Supreme Court interprets the ambit of protections afforded by the Bill of Rights. United States v. Lopez, ___ U.S. ___, ___, 115 S.Ct. 1624, 1639-40 (1995) (Kennedy, J., concurring); Miller v. Johnson, ___ U.S. ___, ___, 115 S.Ct. 2475, 2491 (1995). In enacting RFRA, Congress has intruded into this Court's sphere of power.

In 1990, this Court handed down its decision in Employment Division v. Smith, 494 U.S. 872 (1990), which delineated the protection afforded by the Free Exercise Clause of the First Amendment. Prior to Smith, there were at least two analytical approaches to free exercise jurisprudence. Under the decisions in Wisconsin v. Yoder, 406 U.S. 205 (1972) and Sherbert v. Verner, 374 U.S. 398 (1963), free exercise analysis required courts to apply strict scrutiny. Under Bowen v. Roy, 476 U.S. 693 (1986) and Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439 (1988) this Court applied a more relaxed standard to free exercise claims where the claimant challenges internal government operations. See e.g. Lyng, 485 U.S. at 450-51. In Smith, this Court reviewed the various analyses from the case law and clarified the appropriate standard of scrutiny in free exercise claims. Smith teaches that government need not accommodate religious practices where the challenged government action is facially neutral and generally applicable. Smith, 494 U.S. at 885.

Congress enacted RFRA for the express purpose of overruling this Court's decision in Smith. See, e.g., 42 U.S.C. 2000bb(a)(4) (Smith "virtually eliminated the requirement that the government justify burdens on religious exercise"), and 2000bb(b)(1) (the purposes of RFRA are to "restore the compelling interest test"). The legislative history evidences the same fact; RFRA attacks this Court's holding in Smith. See, generally, The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcom. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2 (1990).

The broad scope of RFRA illustrates why Congress is the wrong body to enforce the Free Exercise Clause. Congress boldly engrafted onto every piece of federal and state legislation a strict scrutiny analysis that applies whenever the legislation impinges on one's right to freely practice his or her religion. This sweeping approach does not allow the delicate balancing act required in harmonizing the conflicts inherent in the Free Exercise and Establishment Clauses. Only the courts can perform that balancing act.

Congress has run afoul of Marbury and Lopez. It has unconstitutionally taken for itself the role of defining the substance of those rights established by the First Amendment. It has exceeded its authority by treading on this Court's domain. RFRA is an unconstitutional usurpation of judicial power.

CONCLUSION

For the foregoing reasons, the MCLU asks this Court to grant a Writ of Certiorari or, in the alternative, to hold this case for resolution pending the Court's decision in Flores.

Dated: October 22, 1996

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